Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FOOD MOVERS INTERNATIONAL, INC.,

Petitioner,

v.

DIAMOND CRYSTAL BRANDS, INC.
and DIAMOND CRYSTAL SALES, LLC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a company incorporated and headquartered in California, whose purchase orders for goods were solicited by and placed with the California agents of a Delaware corporation headquartered in Minnesota, be compelled to defend an action for the price of the goods in Georgia, on the grounds that the buyer received the goods there and sent payments for prior purchases there?

LIST OF PARTIES

Petitioner, Food Movers International, Inc., a California corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears as appendix A to the petition and is reported as *Diamond Crystal Brands, Inc. v. Food Movers International, Inc.*, 593 F.3d 1249 (11th Cir. 2010), rehearing denied.

The opinion of the United States District Court for the Southern District of Georgia appears as appendix B to the petition and is not reported in F.Supp.2d but appears electronically at 2008 WL 2811940.

STATEMENT OF JURISDICTION

Petitioner Food Movers International, Inc. claims that its rights under the Fourteenth Amendment of the U.S. Constitution to due process of law were violated by the district court order, affirmed by the Eleventh Circuit Court of Appeals, compelling it to defend the instant action in the state of Georgia.

The Court of Appeals filed its opinion on January 13, 2010 and denied Food Mover's petition for panel rehearing or rehearing *en banc* on March 15, 2010. The order denying the petition for rehearing is attached as Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

If, when two merchants start transacting interstate business with one another, they pause to consider where any resulting dispute will be litigated, they will be surprised to learn that the answer turns on ill-defined factors that vary from region to region. One person's idea of fundamental fairness often differs from another's, particularly when a dispute is brewing.

This is the unfortunate state of the law as it has evolved since this Court last spoke on the question of personal jurisdiction. While the Court has acknowledged the need for predictability in this context, that ideal is far from realized.

The petitioner in this case, Food Movers, is a small family-owned business that was sought out at its California offices by California-based representatives of Minnesota-based Diamond Crystal, a wholly-owned subsidiary of Hormel. A brief—and, by today's standards, modest— series of purchases was negotiated. Food Movers re-sold the goods without ever taking possession of them, its customers picking them up at Diamond Crystal's Georgia plant. Under the circumstances, Food Movers could not have predicted that, if a dispute arose, it would wind up being hauled across the country to defend a suit in Georgia, 2,500 miles away. Yet that is exactly the result upheld by the Eleventh Circuit's opinion in this case.

The Eleventh Circuit's ruling not only fails to comport with principles of fundamental fairness as articulated by this Court, it also serves to highlight the near-total lack of predictability in the answers to personal jurisdiction questions in this context. The results vary from circuit to circuit. Since the Court last spoke on the issue, the circuits (and the state courts) have split on which factors in the transaction should dictate the result. In one circuit, the place of payment is important; in another it's secondary. In some courts, the delivery terms are paramount; in others, they're inconsequential. Instead of the predictability that the Court has hoped would evolve, matters are resolved on a case-by-case basis, with varying results.

This case presents the Court with the opportunity to bring the reality of personal jurisdiction jurisprudence into harmony with the ideals that the Court has expressed but which have not been realized

in the circuits. Because the question presented affects countless merchants engaged in interstate commerce, and the opinions of the circuit courts are in hopeless conflict, the case falls squarely within Rule 10. The Court should therefore grant *certiorari* to resolve this important and unsettled issue.

STATEMENT OF THE CASE

Food Movers International, Inc. is a California corporation with its principal place of business in Benicia, California. (Dk. 5 at 3-4.)[1] It is a family-owned food-distribution company that buys bulk food products from manufacturers and re-sells them to its customers. (Dk. 5 at 3; 15 at 23.) Because its customers take delivery directly from its supplier, Food Movers itself never takes delivery of the goods. (Dk. 5 at 4-5.) Food Movers has but its single office in California. (*Id.* at 3-4.) It has no employees, agents or facilities outside the state. (*Id.* at 4.)

Diamond Crystal Brands, Inc., is a Delaware corporation with its principal place of business in Minnesota. (Dk. 15 at 20.) Diamond Crystal Sales is a Delaware limited liability company with its principal places of business in Minnesota. (Dk. 15 at 21.) The two companies are represented in California by the Nassar company, whose offices are in Livermore, California. (Dk. 5 at 4, 8-9.)

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1. "Dk. *X*" = Docket of the district court, *document number*.

In September, 2005, representatives of Nassar, accompanied by Diamond Crystal's regional sales manager Scott Seibel (who worked out of the company's facility in Visalia, California) called upon Food Movers in Benicia to solicit bulk orders for Diamond Crystal's Splenda artificial sweetener. (Dk. 5 at 4-5, 15 at 24.) They secured their first order from Food Movers later that month. (Dk. 10 at 37.) Food Movers issued its purchase order to Nasser for fulfillment by Diamond Crystal, with the goods to be picked up by Food Movers's customer. (Dk. 5 at 8-9.) Diamond Crystal required Food Movers to take delivery F.O.B., Savannah, Georgia, a Diamond Crystal plant site, and it instructed Food Movers to send its payments there as well. (Dk. 15 at 24.)[2]

Between September 29 and December 19, 2005, Diamond Crystal sold Food Movers 62,640 cases of Splenda, for which it charged $1,935,576. (Dk. 10 at 23.) Food Movers's customers picked up the goods in Savannah on thirteen occasions from October 3, 2005

2. Although the Eleventh Circuit recited that the parties "cannot agree on who proposed" the delivery term—thereby suggesting that the evidence was in conflict [593 F.3d at 1272]—in fact the undisputed evidence established that Diamond Crystal dictated the term. Food Movers's vice president of sales declared that "Mr. Seibel advised me that delivery would be required at the plant" and that "Food Movers was not given an option for FOB California." (Dk. 15 at 24.) Diamond Crystal's vice president of marketing didn't disagree, declaring only that an unidentified person (he didn't say whether it was someone associated with Food Movers or someone associated with Diamond Crystal) instructed him to make the delivery FOB Savannah. (Dk. 10 at 23 ("I was requested to change the terms to FOB Savannah.").)

and January 18, 2006.[3] (Dk. 10 at 26-38, 15 at 25.) Throughout this period, the only communications related to the purchases were between Food Movers and Nasser and Scibel in California. (Dk. 10 at 24.) Food Movers transmitted payment for the first eleven deliveries to Savannah, as Diamond Crystal had requested. (Dk. 5 at 5.) But it did not pay for the final two shipments, for which Diamond Crystal had charged $228,111.60. (Dk. 1 at 7.)

Diamond Crystal sued Food Movers in Chatham County, Georgia Superior Court.[4] (Dk. 1 at 6.) Food Movers removed the action to the United States District Court for the Southern District of Georgia on the basis of diversity of citizenship. 28 U.S.C. 1332. (Dk. 1.)

Food Movers moved to dismiss for lack of personal jurisdiction under Rule 12(b)(1). (Dkt. 5.) The district court denied the motion. (Dkt. 24.) Following orders granting judgment on the pleadings and summary judgment in favor of Diamond Crystal, the district court entered judgment against Food Movers in the amount

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3. The affidavit of Diamond Crystal's vice president of operations stated that there had been 14 deliveries, but he attached to his declaration only 13 bills of lading. (Dk. 10 at 26-38.) The total number of cases reflected in those 13 bills of lading is 62,640—the same as the total amount sold according to Diamond Crystal's vice president of marketing. (Dk. 10 at 23.)

4. The same day, another wholly-owned Hormel subsidiary—Jennie-O Turkey Store—sued Food Movers in Minnesota state court. That action was later removed to federal court and ultimately dismissed for want of personal jurisdiction. *Jennie-O Turkey Store, Inc. v. Food Movers International, Inc.*, No. 07-cv-1605, 2007 WL 2580599 (D. Minn. Sept. 5, 2007).

of $335,054.92. (Dkt. 94.) The district court denied Food Movers's motion for judgment under Rule 54(b). (Dkt. 98) Food Movers then filed its notice of appeal to the Eleventh Circuit Court of Appeals. (Dkt. 100.)

The Court of Appeals filed its opinion affirming the district court's order denying Food Movers's motion to dismiss. After examining the requirements of the Georgia long-arm statute, the court concluded that "Food Movers established sufficient minimum contacts when it purposefully carried on a substantial and ongoing relationship with a Georgia manufacturer, specified delivery by 'customer pickup' in Savannah, took and transferred legal title to product in Savannah, and sent payments to Savannah on twelve of fourteen transactions." 593 F.3d at 1267.[5] It then denied Food Movers's petition for rehearing and hearing *en banc*.

REASONS FOR GRANTING THE PETITION

In the landmark case of *International Shoe Company v. Washington*, 326 U.S. 310 (1945), this Court articulated the basic modern requirement for personal jurisdiction: a nonresident is amenable to suit only when it has "certain minimum contacts" with the forum such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316.

Over the course of the next four decades, the Court explored the contours of this standard in several

5. Much of the Eleventh Circuit's opinion was devoted to its analysis of Georgia's long-arm statute. 593 F.3d at 1258-67. Because the court concluded that the statute was satisfied in this case, that issue is not before the Court.

commercial cases. In *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957), the Court held that a state could exercise personal jurisdiction over the defendant in any case "based on a contract which had substantial connection with that State." *Id.* at 223. In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court ruled that the plaintiff's unilateral activity could not establish the requisite connection; that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. And in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), the Court found that the defendant was subject to jurisdiction in Florida because he had entered into a "carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida" and had subsequently "caused foreseeable injuries" in that state. *Id.* at 480.

Throughout this line of cases, the Court's touchstone has been predictability:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Burger King, 471 U.S. at 472 (citations omitted). A defendant that has purposefully availed itself of the

protection of the forum state "has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The Court recently returned to this theme in *Hertz Corporation v. Friend*, ___ U.S. ___, 130 S. Ct. 1181 (2010), where it explained that simple jurisdictional rules "promote greater predictability." As the Court explained, "[p]redictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court." *Id.* at 1193 (citation omitted).

At the same time, the Court has repeatedly emphasized that personal jurisdiction cannot be made to turn on "mechanical" tests. *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 478; *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). Instead, the Court has emphasized, the determination of whether minimum contacts exist "is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' " *Kulko*, 436 U.S. at 92 (quoting *Estin v. Estin*, 334 U.S. 541 (1948)).

The absence of rigid rules in this area may enable some courts to arrive at results that strike them as fair or equitable in a particular case, but this same flexibility can deprive businesses of the ability to predict whether a given commercial relationship will subject them to suit in another state. Granted, there will always be easy

cases—particularly where the defendant routinely sells some product to residents of the forum state, thereby deriving an appreciable benefit from its laws. But where the defendant is the buyer rather than the seller, it's often difficult to predict whether a court will find that the defendant has "purposefully availed itself" of the privilege of conducting activities in the forum State.

In such a case—that is, one involving a defendant who purchased a product across state lines—what are the attributes that will establish that the purchase contract has a "substantial connection" with the forum state, as this Court required in *McGee*? The lower courts have focused on several considerations:

Seller's offices or manufacturing facility: Some considerations are easy to rule out. For example, the defendant will generally know that it's purchasing a product from a foreign seller, and may have reason to believe that the product will be manufactured in the forum state. Most of the circuit courts and state high courts that have considered the issue agree that those facts should count for little or nothing in the jurisdictional calculus. *See, e.g.*, *Kerry Steel, Inc. v. Paragon Industries, Inc.*, 106 F.3d 147, 151 (6th Cir. 1997) ("[t]he mere fact that Paragon entered into a contract with a Michigan corporation does not mean that Paragon purposefully availed itself of the 'benefits and protections' of Michigan law"); *Bell Paper Box, Inc. v. Trans Western Polymers, Inc.*, 53 F.3d 920, 922 (8th Cir. 1995) ("[a]lthough Trans Western fully anticipated performance by Bell in South Dakota, 'foreseeability' . . . alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause");

Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596, 603 (7th Cir. 1979) ("Mountain State's belief . . . that Lakeside would choose to perform its contractual obligations in Wisconsin does not constitute an invocation of the benefits and protections of Wisconsin's laws").

But even on this basic point, not all courts are in accord. Some courts have premised findings of jurisdiction on seemingly nothing more than the mere fact of an interstate contract. *See Quality Pork International v. Rupari Food Services, Inc.*, 267 Neb. 474, 484-85 (2004) ("Quality Pork's claim arose out of Rupari's contacts with a company located in Nebraska. Therefore, in evaluating whether the exercise of specific personal jurisdiction is reasonable, we conclude that it would not be unduly burdensome for Rupari to defend an action in Nebraska").

Communications: Similarly, most defendants will have directed written, electronic or telephonic communications to the plaintiff in the forum state. Most courts agree that these contacts are largely if not entirely irrelevant. (*See, e.g., Kerry Steel*, 106 F.3d at 151 ("[i]t is immaterial that Paragon placed telephone calls and sent faxes to Kerry Steel in Michigan"); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982) ("[t]he use of interstate facilities (telephone, the mail) . . . are secondary or ancillary factors and cannot alone provide the 'minimum contacts' required by due process"); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983) ("[a]s for the exchange of communications between Texas and Alaska in the development of the

contract, that in itself is also insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws"); *Lakeside Bridge & Steel*, 597 F.2d at 604 ("[u]se of the interstate telephone and mail service to communicate with a Wisconsin plaintiff, if constituting contacts supporting jurisdiction, would give jurisdiction to any state into which communications were directed").

But here, too, some courts disagree, placing significant weight on the defendant's interstate communications. *See Sloss Industries Corp. v. Eurisol*, 488 F.3d 922, 932-33 (11th Cir. 2007) (noting that jurisdiction was appropriate in earlier case over defendant United Aircraft Corporation in part because "United's representatives had . . . sent 16 documents and 20 teletype and phone messages into Massachusetts"); *Watlow Electric Mfg. Co. v. Patch Rubber Co.*, 838 F.2d 999, 1002 (8th Cir. 1988) (holding that "the combination of interstate communications extending into Missouri" and other factors "all underscore Patch's willingness to undertake continuing obligations to a Missouri corporation").)

Payment: Just as most courts agree that the transmission of communications into the forum state is largely irrelevant to the jurisdictional calculus, most courts also agree that a defendant doesn't subject itself to jurisdiction in the plaintiff's state simply by acceding to the plaintiff's request to mail payments there. *See, e.g., Hydrokinetics*, 700 F.2d at 1029 ("[n]or do we weigh heavily the fact that Alaska Mechanical may have mailed payment checks into the forum state in exchange for the goods"); *Scullin Steel*, 676 F.2d at 314 ("the

making of payments in the forum state . . . are secondary or ancillary factors and cannot alone provide the 'minimum contacts' required by due process").

But not all courts agree. In *SII Megadiamond, Inc. v. American Superabrasives Corporation*, 969 F.2d 430 (Ut. 1988), for example, the court premised its finding of purposeful availment on the defendant's having mailed payments for previous purchases into the forum state. *Id.* at 434-36. Likewise, the Eleventh Circuit in this case found that Food Movers was subject to jurisdiction in Georgia in part because it had agreed to—and did—mail its payments for the previous purchases there. *Food Movers*, 593 F.3d at 1266 ("[i]n each of the twelve transactions in which Food Movers did pay for the Splenda, it sent payments to Diamond Crystal in Georgia. The implied promise to send payments to Georgia is relevant to whether Food Movers transacted any business there"); *see also id.* at 1269 ("[a] contract calling for payment and delivery in a forum requires 'contact' with the forum").

Delivery terms: The fragile consensus that exists among the courts concerning the first three factors breaks down further when it comes to the delivery terms. If the title to the products and the responsibility for arranging further transportation passed to the buyer in the forum state—as where the seller makes the goods available "FOB" its facility—some courts have held that the buyer thereby "availed itself" of the protections of the forum state's laws, such as by taking advantage of the protection provided by the local police and fire departments. *See, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1364 (7th Cir.

1985) (premising finding of jurisdiction on fact that forum state "provided police and fire protection and perhaps other services for the facilities at which the buyer took possession"); *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 820 (8th Cir. 1994) (quoting and following *Aftam*). The Eleventh Circuit in this case followed similar reasoning, premising its finding of jurisdiction partly on the fact that Food Movers agreed to have its customers arrange pick-up at Diamond Crystal's loading dock, thereby assertedly "indicat[ing] that Food Movers intended to affiliate with Georgia and invoke the benefits and protections of its laws." *Food Movers*, 593 F.3d at 1273.[6]

Most courts disagree with these authorities, ruling that the technical delivery terms (which are generally dictated by the seller) are irrelevant to the jurisdictional analysis. *See Scullin Steel*, 676 F.2d at 314 ("the provision for delivery within the forum state are secondary or ancillary factors and cannot alone provide the 'minimum contacts' required by due process"); *Wisconsin Electrical Manufacturing Co. v. Pennant Products, Inc.*, 619 F.2d 676, 678 n.9 (7th Cir. 1980) (attaching "little, if any, weight to the contract term specifying that

6. The Eleventh Circuit acknowledged that an "F.O.B. forum delivery term does not necessarily create minimum contacts because it is a formal term relating to title and who bears the risk of loss." 593 F.3d at 1272-73. But the court then explained that the term was significant in this case because Food Movers sought delivery by "customer pickup"—in other words, that Food Movers had invoked the benefits and protections of Georgia law by having its customers arrange to pick up the Splenda rather than asking Diamond Crystal to arrange shipment.

shipment be F.O.B. plaintiff's plant in New Berlin"). *Cf. Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980) (noting, in product liability case against manufacturer, that "jurisdiction does not depend on the technicalities of when title passes").

Dollar amount: Some courts, when ruling that an out-of-state purchaser may properly be subject to jurisdiction in the forum state, justify their decisions in part by pointing to the dollar amount of the purchase (or purchases). *See, e.g., SH Megadiamond*, 969 P.2d at 434 (premising finding of jurisdiction on defendant's earlier prediction that relationship would lead to sales of "$2.6 million for 1995 alone"); *Quality Pork*, 267 Neb. at 484 (finding that jurisdiction was appropriate in part because plaintiff "filled orders valued at $43,736.84, $47,467.80, and $44,051.98"). The Eleventh Circuit followed suit in this case, premising its finding of jurisdiction partly on the fact that "[i]n just six months, Food Movers purchased more than $1.9 million dollars worth of Splenda." *Food Movers*, 593 F.3d at 1270.

But as the Seventh Circuit has pointed out, the "dollar amount of the transaction can hardly be a principled basis for distinguishing between one case and another, let alone for ignoring the requirement, stated in *Hanson* and reiterated in *Shaffer* [*v. Heitner*, 433 U.S. 186 (1977)], that the defendant, not the plaintiff, conduct activities in the forum state." *Lakeside Bridge & Steel*, 597 F.2d at 604.

Number of prior transactions: Some courts, on concluding that jurisdiction over an out-of-state purchaser is improper, justify their decisions in part by pointing out that the parties' course of dealing involved but a single transaction. *See, e.g.*, *Bellboy Seafood Corp. v. Kent Trading Corp.*, 484 N.W.2d 796, 796 (Minn. 1992) (finding no jurisdiction in part because "[t]he record demonstrates here but a single sales transaction"); *Hydrokinetics*, 700 F.2d at 1029 ("we do consider significant that only a single transaction is involved in this case"). Conversely, some courts premise a finding of jurisdiction on the defendant's having made multiple purchases across state lines. *See, e.g.*, *Sloss Industries*, 488 F.3d at 931, 933 (finding jurisdiction in part because the "this case involves ten orders placed by Eurisol over a period of several months"). The Eleventh Circuit in this case did the same, finding that jurisdiction was appropriate in part because Food Movers had assertedly made "fourteen transactions, each of which involved purposeful and meaningful contact by Food Movers with Georgia"—a course of dealing, the court found, that "amounts to a substantial relationship in which Food Movers deliberately associated with Georgia." *Food Movers*, 593 F.3d at 1270.

But if one purchase doesn't provide a foundation for the exercise of jurisdiction, it's not clear why a series of purchases should do so, especially where the prior purchases can't be said to have given rise to the transaction at issue. Moreover, if the number of purchases and the dollar amount are both relevant, it's

not clear which way they point: Is a single purchase of $2 million more or less supportive of jurisdiction than ten purchases of $200,000?[7]

* * *

In 1980, Justice White, dissenting from this Court's denial of *certiorari* in *Lakeside Bridge & Steel*, 445 U.S. 907 (1980), lamented that the unsettled state of the law made it hard for businesses to predict when they might be subject to suit in a foreign jurisdiction for having made a purchase there:

> the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. . . . The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of

7. Of course, both the number of transactions and the total dollar amount could conceivably be relevant to the question of whether a defendant has been carrying on a "continuous and systematic" business in the forum state and should thus be subject to *general* jurisdiction. But Diamond Crystal has never contended that Food Movers was subject to general jurisdiction in Georgia, and such a claim would almost certainly be foreclosed by established law, including in particular this Court's opinion in *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984).

> result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question. I would grant the petition in order to address this important problem. [*Id.* at 909-11 (WHITE, J., dissenting from denial of *certiorari*).]

That same year, the Seventh Circuit echoed this concern, expressing sympathy for the beleaguered district judge called upon to apply the uncertain precedents:

> Ironically, the same court whose judgment was reversed in *Lakeside* dismissed this action in the reasonable belief that this case was close enough to *Lakeside* to be decided the same way. We appreciate and sympathize with the position of that court and other trial courts, state and federal, that must so frequently decide an amorphous federal constitutional question in order to determine whether service of process has been effective in an otherwise routine case. So long as long-arm jurisdiction reaches to the outermost limits due process will permit and so long as due process standards continue to be susceptible only of a case-by-case application, reasonable minds will differ in particular cases and the "degree of predictability to the legal system" desired by the Supreme Court, World-Wide Volkswagen Corp., 100 S.Ct. at 567, will prove elusive. A strong case could be made for a set of concrete, objective

> standards, at least as a statutory matter, however arbitrary they might seem in individual cases, that would enable litigants to determine whether jurisdiction was present without taking the question to a reviewing court. [*Wisconsin Electrical Manufacturing*, 619 F.2d at 679.]

This case demonstrates that the intervening three decades have not made the relevant law any more clear. Had Food Movers, before making the purchases at issue in this litigation, consulted a knowledgeable attorney in an effort to determine whether the contemplated transactions would subject it to suit across the continent in Georgia, it would likely have been told that neither instructing its customers to pick up the goods in Georgia nor sending payments there would render it amendable to suit there, and that there was no principled reason to believe that either the number of transactions or their dollar amount would affect the outcome. Yet it was precisely those four considerations that prompted the Eleventh Circuit to hold that Food Movers could be summoned to court in Georgia. This Court should grant *certiorari* so that future businesses contemplating out-of-state purchases will stand a better chance of predicting whether doing so will subject them to suit in a foreign jurisdiction.

CONCLUSION

For thirty years, the lower courts have struggled to develop a principled basis for determining when an interstate purchase should subject the purchaser to jurisdiction in the seller's state. This Court should grant *certiorari* in this case to provide some much-needed guidance.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 13, 2010

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 08-14782

DIAMOND CRYSTAL BRANDS, INC.,
DIAMOND CRYSTAL SALES, LLC.,

Plaintiffs-Counter-Defendants-Appellees,

v.

FOOD MOVERS INTERNATIONAL, INC.,

Defendant-Counter-Claimant-Appellant,

HORMEL FOODS CORPORATION,

Counter-Defendant.

Before TJOFLAT, ANDERSON and STAPLETON,* Circuit Judges.

TJOFLAT, Circuit Judge:

This challenge to the district court's exercise of personal jurisdiction over a nonresident defendant gives

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* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

us occasion to revisit our jurisprudence regarding the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91 (the "long-arm statute"), in light of recent pronouncements by the Georgia Supreme Court. Whereas we have previously understood the Georgia long-arm jurisdictional analysis to merge into a single, coextensive procedural due process analysis, the Georgia Supreme Court has since made clear the independent importance of the statute. In *Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank of Ames, Iowa*, 279 Ga. 672, 620 S.E.2d 352, 355-56 (Ga. 2005), the Georgia Supreme Court held that a trial court must engage in a separate, literal application of the Georgia long-arm statute in addition to a due process inquiry in deciding whether personal jurisdiction exists over a nonresident defendant. We now conform the rule in this circuit to the state law as announced by the Georgia Supreme Court. Additionally, we conclude that although the district court may have erred in its analysis under this newly clarified standard, jurisdiction is proper under both the long-arm statute and the Due Process Clause of the Fourteenth Amendment. We affirm.

I.

This action was brought by Diamond Crystal Brands, Inc. and Diamond Crystal Sales, LLC (collectively "Diamond Crystal") against Food Movers International, Inc. ("Food Movers") alleging nonpayment for two shipments of Splenda Brand sweetener ("Splenda"). Diamond Crystal Brands, Inc., an international seller of sugar and other sweetening

products, is a Delaware corporation that maintains a facility in Savannah, Georgia. Diamond Crystal Sales, LLC is a Delaware limited liability sales company qualified to do business in Georgia and is under common ownership with Diamond Crystal Brands. Food Movers is a food distribution company that purchases bulk food products from manufacturers for immediate resale to retail and other distributor customers. It is a California corporation with its sole place of business in Benicia, California. Food Movers has no offices, distribution centers, or personnel outside the state of California, and its employees do not travel outside of California to conduct business.[1]

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1. Diamond Crystal alleged in its complaint that Food Movers "maintains an ongoing business presence in Georgia through a regional distribution center in Georgia." Food Movers specifically denied this assertion in an affidavit, filed with its motion to dismiss, from its president, Anthony LaMonica. Diamond Crystal attempted to bolster its allegation with an affidavit, filed with its opposition to Food Movers's motion to dismiss, from Scott Seibel, a region sales manager for Diamond Crystal Brands, in which Seibel testified that "Thomas LaMonica, Food Movers International's general manager, gave me a map of the United States that was broken down into geographic regions. . . . Mr. LaMonica told me that the distribution centers shown on the map were distribution centers with which he had done business in the past." The map attached to the Seibel affidavit indicated one such distribution center in Atlanta, Georgia. With its reply in support of its motion to dismiss, Food Movers submitted the affidavit of its vice president of sales, Thomas LaMonica, which stated that Food Movers does not have a distribution center in Georgia, has never

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Appendix A

Food Movers's business model is to purchase products from manufacturers, with the purchases sometimes being facilitated by outside food brokers, and then to quickly resell the products, usually before even taking delivery from the manufacturer, to its customers. Its customers then arrange for and accept delivery from the manufacturer and resell the products to their own customers or to the public.

In this case, Diamond Crystal's sales to Food Movers were facilitated by Nasser Company, Inc. ("Nasser"), a California-based food broker that markets Diamond Crystal's products. Nasser first solicited the sales to Food Movers, and Nasser and Diamond Crystal Brands's California-based region sales manager, Scott Seibel, traveled to Food Movers's office in California to negotiate the terms of the sales. All of the negotiations took place either in person at Food Movers's office in California or through telephone conversations between

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done business with any distribution center in Georgia, and has no distributor agreements in Georgia. Regardless of whether the district court properly received this latter evidence for consideration, Diamond Crystal's allegation and evidence do not establish that Food Movers itself maintained a distribution center in Georgia, but only that it may have done business in the past with a distributor in Georgia. Nor does this evidence indicate the volume of business Food Movers may have done with a Georgia distribution center or when it conducted such business. Moreover, Diamond Crystal has not shown how any such prior relationship between Food Movers and a distribution center in Atlanta has anything to do with the transactions at issue in this case.

Food Movers and Nasser or Seibel, all of whom were in California.

As a result of these discussions, Food Movers submitted purchase orders to Nasser in California for the purchase of Diamond Crystal products. In all, from August 2005 to January 2006, Food Movers ordered bulk Splenda from Diamond Crystal, through Nasser, in fourteen transactions totaling more than $ 1.9 million. Diamond Crystal alleges that Food Movers failed to pay for two of these shipments, relating to purchases made on January 13 and 18, 2006, and therefore owes Diamond Crystal $288,111.60 plus prejudgment interest.

The terms and mechanics of the purchases included the following. Food Movers submitted its purchase orders to Nasser in California. Immediately thereafter, Food Movers resold the product to its own third-party customers. Diamond Crystal and Food Movers agreed that Diamond Crystal would tender the product F.O.B. Savannah,[2] at its plant.[3] Diamond Crystal also invoiced

2. Georgia's enactment of the Uniform Commercial Code provides,

> Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:
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> (a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (Code Section 11-2-504) and

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Food Movers from its Savannah facility. Although the purchase orders specified "[c]ustomer pickup" and the bills of lading recorded delivery as having been taken "buy buyers [sic] truck," Food Movers offered affidavit evidence that its personnel did not actually take delivery of the product from Diamond Crystal.[4] Instead, as the

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> bear the expense and risk of putting them into the possession of the carrier; or
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> (b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (Code Section 11-2-503) . . . ;

O.C.G.A. § 11-2-319(1). In other words, the use of the term "F.O.B. Savannah" in this case means that Diamond Crystal had the obligation to tender the product at its plant in Savannah and bore the risk of loss for the product until it was tendered.

3. The parties sharply contest how the F.O.B. Savannah term came into being. Diamond Crystal asserts that it initially offered the product F.O.B. Visalia, California and claims that Food Movers requested that the terms be changed to F.O.B. Savannah (presumably to avoid the time and expense of shipping product ultimately destined for later distribution in the Southeast across the country twice). In contrast, Food Movers maintains that Seibel, the Diamond Crystal representative, insisted that delivery would be required at the Savannah plant due to the volume of product involved and that Diamond Crystal never offered an F.O.B. California option.

4. Food Movers maintains that these references are to its third-party customers, who were the "customer[s]" and "buyers" responsible for hiring carriers and picking up the product from Diamond Crystal for their own purposes.

product had been resold to third-party customers of Food Movers by the time of tender by Diamond Crystal, those third-party customers took delivery of the product directly from Diamond Crystal. Accordingly, Food Movers never picked up the Splenda in Georgia. It did, however, send payments (for the shipments for which it paid), drawn on its California bank, by mail or wire transfer to Diamond Crystal in Georgia.

On February 28, 2007, Diamond Crystal filed this lawsuit, seeking the $288,111.60 Food Movers failed to pay, in the Superior Court of Chatham County, Georgia. Food Movers removed the action, on the basis of diversity jurisdiction, to the United States District Court for the Southern District of Georgia on March 22, 2007. On April 6, 2007, Food Movers moved to dismiss Diamond Crystal's complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction and submitted affidavit evidence in support of its challenge to the court's jurisdiction. After full briefing, including the submission of counter-affidavits by Diamond Crystal, the district court denied the motion on August 3, 2007.

Food Movers subsequently answered the complaint, preserving its objection to personal jurisdiction and asserting counterclaims against Diamond Crystal for breach of contract, tortious and bad faith breach of contract, unfair trade practices, and deceptive trade practices in connection with Diamond Crystal and related companies' decisions to stop selling Splenda and

other products to Food Movers.[5] Food Movers later filed an amended answer and counterclaims asserting claims against Diamond Crystal for breach of contract and against Diamond Crystal and its corporate parent for "Unfair, Unlawful, Discriminatory, and Anti-Competitive Business Practices" in violation of California unfair competition and antitrust law and federal antitrust law. Food Movers admitted that it withheld payment on two of the Splenda purchase orders but denied that it owed Diamond Crystal any money due to Diamond Crystal's alleged conduct implicated in the counterclaims.

On June 20, 2008, the district court granted Diamond Crystal judgment on the pleadings for its complaint and entered judgment on that order the same day. It stayed enforcement of its judgment, however, pursuant to Federal Rule of Civil Procedure 62(h),

5. We reject, with minimal discussion, Diamond Crystal's argument that Food Movers waived its defense of lack of personal jurisdiction by asserting its counterclaims. Food Movers filed its answer, which preserved its personal jurisdiction defense, and counterclaims only after the district court denied the motion to dismiss for lack of personal jurisdiction. *See Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc.*, 345 F. Supp. 296, 299 (S.D. Ga. 1972) (rejecting the argument that defendant waived jurisdiction as a result of filing defenses and a counterclaim because "[g]enerally, a waiver results only when a defendant pleads to the merits without excepting to the jurisdiction of the court"), *aff'd*, 477 F.2d 910, 911 (5th Cir. 1973). In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

pending the resolution of Food Movers's counterclaims. On July 21, 2008, the district court granted Diamond Crystal's motion for summary judgment on Food Movers's counterclaims and lifted the stay of its June 20, 2008, judgment. The court entered final judgment pursuant to its July 21 summary judgment order on September 10, 2008. Food Movers now appeals the district court's denial of its motion to dismiss for lack of personal jurisdiction.[6]

II.

"We have consistently held that the issue of whether personal jurisdiction is present is a question of law and subject to *de novo* review." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009).

"A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). "Where, as here, the defendant challenges

6. Food Movers filed its notice of appeal, which also purported to include all subsequent orders of the district court through the entry of final judgment directed in the court's July 21, 2008, summary judgment order, on August 20, 2008. We treat the notice of appeal as if it were filed on September 10, 2008—the date the district court actually entered final judgment—by operation of Fed. R. App. P. 4(a)(2). As the parties have only briefed and argued the issue of personal jurisdiction, that is the only issue we address.

jurisdiction by submitting affidavit evidence in support of its position, 'the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction.'" *Id.* (quoting *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002)); *see also Polskie Linie Oceaniczne v. Seasafe Transport A/S*, 795 F.2d 968, 972 (11th Cir. 1986) (noting that, if the defendant makes a showing of the inapplicability of the long-arm statute, "the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint"). "Where the plaintiff's complaint and supporting evidence conflict with the defendant's affidavits, the court must construe all reasonable inferences in favor of the plaintiff." *Meier*, 288 F.3d at 1269.

III.

A.

"A federal court sitting in diversity undertakes a two-step inquiry in determining whether personal jurisdiction exists: the exercise of jurisdiction must (1) be appropriate under the state long-arm statute and (2) not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). "When a federal court uses a state long-arm statute, because the extent of the statute is governed by state law, the federal court is required to construe it

as would the state's supreme court." *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1265 (11th Cir. 1998). Therefore, we must interpret and apply Georgia's long-arm statute in the same way as would the Georgia Supreme Court.

As pertinent to this case, the Georgia long-arm statute provides:

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
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> (1) Transacts any business within this state;

O.C.G.A. § 9-10-91(1). For many years, our court has followed the interpretation that "Georgia's long arm statute confers *in personam* jurisdiction to the maximum extent allowed by the due process clause of the federal Constitution." *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994).[7] Under this

7. *See also, e.g., McGow v. McCurry*, 412 F.3d 1207, 1214 (11th Cir. 2005); *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 784 (11th Cir. 2004); *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 746 (11th Cir. 2002) (per curiam); (Cont'd)

rule, courts in this circuit have even gone so far as to pass over the long-arm analysis entirely and conflate it with, or collapse it into, the due process inquiry.[8]

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Complete Concepts, Ltd. v. Gen. Handbag Corp., 880 F.2d 382, 388 (11th Cir. 1989) (per curiam) ("Both the former Fifth Circuit Court of Appeals and this circuit have observed that this section is coterminous with due process."); *Southwire Co. v. Trans-World Metals & Co. Ltd.*, 735 F.2d 440, 445 (11th Cir. 1984); *cf. Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 378-79 (5th Cir. 1980) (noting statements of Georgia courts suggesting that the long-arm statute is coextensive with due process, but holding that the facts of the case did not require a finding that the long-arm statute reached the limits of due process).

8. *See, e.g., Vermeulen v. Renault, U.S.A. Inc.*, 965 F.2d 1014, 1021 (11th Cir. 1992) ("When the courts of the forum State have interpreted the forum's long-arm statute to confer jurisdiction to the limits allowed by federal due process, state law need not be applied: we need only ask whether the exercise of jurisdiction over the nonresident defendant comports with due process."), *amended and superseded on other grounds*, 975 F.2d 746 (11th Cir. 1992), *modified and superseded on other grounds*, 985 F.2d 1534 (11th Cir. 1993); *Complete Concepts*, 880 F.2d at 388 ("[O]nce we are satisfied that the courts of the forum state have construed their long arm statute into lock-step conformity with the Constitution, the problem reduces to whether the defendant purposefully established 'minimum contacts' in the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)); *Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc.*, 117 F. Supp. 2d 1366, 1369 (N.D. Ga. 2000) ("Where

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In 2005, however, the Georgia Supreme Court clarified the status of the state's long-arm statute, at once broadening the statute's reach and injecting renewed vitality into its restrictions. *Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank*

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a state's long-arm statute confers personal jurisdiction to the limits of Due Process, the court may pass over analysis of the statute and exercise jurisdiction where the constitutional requirements are satisfied."); *Horsley v. Feldt*, 128 F. Supp. 2d 1374, 1377 (N.D. Ga. 2000) ("If, however, a state's long arm statute confers personal jurisdiction to the limits of the Due Process Clause, the Court may pass over analysis of the statute and exercise jurisdiction where the constitutional requirements are satisfied."); *Maxwell Chase Techs., L.L.C. v. KMB Produce, Inc.*, 79 F. Supp. 2d 1364, 1367 (N.D. Ga. 1999) ("Where a state's long arm statute confers personal jurisdiction to the limits of Due Process, the Court may pass over analysis of the statute and exercise jurisdiction where the constitutional requirements are satisfied."); *Railcar, Ltd. v. S. Ill. Railcar Co.*, 42 F. Supp. 2d 1369, 1372 (N.D. Ga. 1999) ("[T]he Georgia long arm statute does confer personal jurisdiction to the full extent permitted by the Due Process Clause of the United States Constitution. . . . Accordingly, the Court will move directly to consideration of whether the exercise of personal jurisdiction over SIRC is consistent with the Due Process Clause."); *Urspruch v. Greenblum*, 968 F. Supp. 707, 710 (S.D. Ga. 1996) ("'When the courts of the forum State have interpreted the forum's long-arm statute to confer jurisdiction to the limits allowed by federal due process, state law need not be applied: [the Court] need only ask whether the exercise of jurisdiction over the nonresident defendant comports with due process.'") (alteration in original) (quoting *Francosteel Corp. v. M/V Charm*, 825 F. Supp. 1074, 1077 (S.D. Ga. 1993)).

of Ames, Iowa, 279 Ga. 672, 620 S.E.2d 352 (Ga. 2005). Most significantly, the supreme court made clear that a trial court must undertake two inquiries, one under the Georgia long-arm statute and another under due process. It explained that "'[t]he rule that controls is our statute, *which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction.*'" *Id.* at 353 (emphasis added) (quoting *Gust v. Flint*, 257 Ga. 129, 356 S.E.2d 513, 514 (Ga. 1987)). We have not yet had the opportunity to address *Innovative Clinical* and its impact on our jurisprudence regarding Georgia's long-arm statute. Thus, we begin with a thorough examination of *Innovative Clinical*. We conclude that, through *Innovative Clinical*, the Georgia Supreme Court has demonstrated that our previous approach is an incorrect statement of Georgia law: the Georgia long-arm statute does not grant courts in Georgia personal jurisdiction that is coextensive with procedural due process.[9] Instead, the long-arm statute

9. Indeed, the Georgia Supreme Court specifically noted our court's "erroneous" interpretation of the state's long-arm statute:

> Although the Federal courts persist in reiterating the language from *First United Bank of Mississippi [v. First National Bank of Atlanta*, 255 Ga. 505, 340 S.E.2d 597 (Ga. 1986)], that Georgia's long-arm statute confers in personam jurisdiction to the maximum extent allowed by the due process clause of the U.S. Constitution, *e.g.*, *Francosteel Corp. v. M/V Charm*, 19 F.3d 624 (IV) (11th Cir. 1994), the *First*

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must be read literally. It imposes independent obligations that a plaintiff must establish for the exercise of personal jurisdiction that are distinct from the demands of procedural due process.[10]

It is beyond cavil that the exercise of personal jurisdiction in Georgia requires a court to find that at least one prong of the long-arm statute is satisfied. *See Rudo v. Stubbs*, 221 Ga. App. 702, 472 S.E.2d 515,

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> *United* holding was superseded by *Gust fv. Flint*, 257 Ga. 129, 356 S.E.2d 513 (Ga. 1987)]. The Eleventh Circuit's interpretation of OCGA § 9-10-91 is not binding on this Court and it is not necessary for this Court to correct erroneous Federal interpretations of our State's statutes for the precedential value of our opinions to remain the controlling authority on the proper interpretation of those statutes.

Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank of Ames, Iowa, 279 Ga. 672, 620 S.E.2d 352, 354 n.2. (Ga. 2005).

10. The Georgia long-arm statute enumerates five separate bases for the exercise of personal jurisdiction, encompassing various types of "acts, omissions, ownership, use, or possession" that can subject a defendant to the statute's reach. O.C.G.A. § 9-10-91. We understand the basic rule of Innovative Clinical to apply to all subsections of the statute, *see Innovative Clinical*, 620 S.E.2d at 354-55 (discussing O.C.G.A. § 9-10-91(2) and (3)), and we generally adopt the rule requiring courts to apply each provision of the statute literally and independently. Since subsection (1) of the statute—requiring that a defendant "[t]ransact[] any business within this state"—is the only basis for long-arm jurisdiction asserted in this case, however, the balance of our discussion focuses on O.C.G.A. § 9-10-91(1).

516 (Ga. Ct. App. 1996). *Innovative Clinical* clarified that to satisfy the long-arm statute, a nonresident defendant must "do certain acts within the state of Georgia."620 S.E.2d at 353. Under subsection (1), the certain act is "[t]ransact[ing] any business within this state." O.C.G.A. § 9-10-91(1). Since *Innovative Clinical*, the Georgia Court of Appeals has reaffirmed, as part of "the traditional three-part test used in determining whether long arm jurisdiction exists based on the transaction of business," that such jurisdiction only exists "'if (1) the nonresident defendant *has purposefully done some act or consummated some transaction in this state . . .*'"[11]

11. The full three-part test set forth in Aero Toy Store is as follows:

> Jurisdiction exists on the basis of transacting business in this state if (1) the nonresident defendant has purposefully done some act or consummated some transaction in this state, (2) if the cause of action arises from or is connected with such act or transaction, and (3) if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice.

Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 631 S.E.2d 734, 737 (Ga. Ct. App. 2006) (quoting *Robertson v. CRI, Inc.*, 267 Ga. App. 757, 601 S.E.2d 163, 166 (Ga. Ct. App. 2004)). The Georgia Court of Appeals then explained that "[t]he initial two prongs of the jurisdictional test are used to determine whether defendant has established the minimum contacts necessary for the exercise of jurisdiction." *Id.* (quoting *Robertson*, 601 S.E.2d at 167-68). This interpretation, however, which appears to continue to collapse the long-arm test into the "minimum

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Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 631 S.E.2d 734, 736-37 (Ga. Ct. App. 2006) (emphasis added) (quoting *Robertson v. CRI, Inc.*, 267 Ga. App. 757, 601 S.E.2d 163, 166 (Ga. Ct. App. 2004)). Accordingly, subsection (1) long-arm jurisdiction in Georgia expressly depends on the actual transaction of business—the doing of some act or consummation of some transaction—by the defendant in the state.

It is clear that the *Innovative Clinical* court intended to broaden the reach of the long-arm statute by stripping away certain limitations, not expressly contained in the statute, that various courts had injected into the statute over time.[12] For example, courts had limited the application of subsection (1) to contract cases

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contacts" due process analysis and which relied on quoted language from a Georgia Court of Appeals decision issued prior to *Innovative Clinical*, is inconsistent with the independent and literal long-arm inquiry mandated by the Georgia Supreme Court in *Innovative Clinical*. Therefore, to remain faithful to *Innovative Clinical*, we interpret the first prong of this test as reflecting the requirement of subsection (1) of the long-arm statute and the second and third prongs as comprising the traditional due process inquiry. The significance of the three-prong approach is that, under Georgia law, there must be a long-arm assessment that is separate and apart from the due process analysis.

12. *Innovative Clinical*, 620 S.E.2d at 355 ("We hereby overrule all prior cases that fail to accord the appropriate breadth to the construction of the 'transacting any business' language of OCGA 9-10-91(1).")

and construed it to require the nonresident defendant's physical presence in Georgia (thereby minimizing the import of the nonresident's intangible contacts with the state), even though neither requirement appears on the face of the statute. *Innovative Clinical*, 620 S.E.2d at 355. In adopting a literal construction of subsection (1), the supreme court appropriately discarded such artificial limitations on the statutory jurisdiction of courts in Georgia. We recognize the importance of the supreme court's abandonment of these extraneous limitations on the statute, and in our effort to follow the supreme court's instruction to "give the same literal construction to subsection (1) of O.C.G.A. § 9-10 91 that we give to the other subsections," we adopt the court's approach. *Id.*

The Georgia Supreme Court did not, however, jettison the lone and unequivocal requirement that subsection (1) plainly does impose: "under that literal construction, O.C.G.A. § 9-10-91(1) grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State." *Id.* (emphasis added). Thus, literally transacting business within Georgia remains a precondition to long-arm jurisdiction that is independent from the dictates of due process.

After emphasizing this point, the supreme court immediately recognized that even this literal construction of subsection (1) would "expand the personal jurisdiction of Georgia courts beyond that permitted by constitutional due process," by, for

example permitting jurisdiction over a defendant who literally transacts any business in Georgia but over whom, in the circumstances of a particular case, the exercise of jurisdiction would violate due process. *Id.* To address this concern, the court reasonably qualified its holding by adding the proviso that "we accordingly construe subsection (1) as reaching only 'to the maximum extent permitted by procedural due process.'" *Id.* (emphasis added) (quoting *Coe & Payne Co. v. Wood-Mosaic Corp.*, 230 Ga. 58, 195 S.E.2d 399, 401 (Ga. 1973)).

Lest there be any misunderstanding, this language does *not* mean that subsection (1)—or any provision of the long-arm statute—is coextensive with constitutional due process. Rather, this language makes clear that due process concerns may limit the full extent of the "transacts any business" prong. But this certainly does not mean that the two inquiries are one in the same.

Indeed, the Georgia Supreme Court explained that the long-arm statute is not coextensive with due process when it stated that the statute's various "limiting conditions may *preclude* a Georgia court from exercising personal jurisdiction over the nonresident to the fullest extent permitted by constitutional due process." *Id.* at 354 (construing O.C.G.A. § 9-10-91(3)) (emphasis added). The supreme court also noted the Georgia General Assembly's retention of statutory limitations on jurisdiction, despite pleas from the state judiciary to expand personal jurisdiction to the outer limits of due process, and directed that courts must abide by the plain and unambiguous restrictions provided by the

legislature, even if those literal limits deprive allegedly damaged Georgians of a forum in the state.[13] *Id.* at 355 (same).

13. Because the Georgia Supreme Court's frank statement on this point is both thorough and emphatic, we are moved to include it at length:

> For over 17 years the justices of this Court and the judges of the Court of Appeals have urged the Legislature to amend Georgia's long-arm statute so as to provide the maximum protection for Georgia residents damaged by the out-of-state acts or omissions committed by nonresident tortfeasors. *See Gust*, *supra*, 257 Ga. at 130, 356 S.E.2d 513 (Gregory, J., concurring); *Phears v. Doyne*, 220 Ga. App. 550, 552, 470 S.E.2d 236 (1996) (Beasley, C.J., concurring specially). Despite the eloquence of these pleas, the Legislature has chosen to retain the statutory limitations on in personam jurisdiction set forth in OCGA § 9-10-91(3). In our system of checks and balances, it is as inappropriate for the judicial branch to encroach upon the powers of the legislative or executive branches as it would be for either of those branches to encroach upon the powers of the judicial branch. Thus, . . . the fact that Georgians damaged by nonresidents are deprived of a forum in this State to the fullest extent permitted by due process is not the result of court decisions interpreting OCGA § 9 10-91(3) but the result of the plain and unambiguous language of OCGA § 9 10-91. The courts cannot reject the plain language of a statute unless it will lead to unreasonable consequences or absurd results not contemplated by the Legislature. See generally *Haugen v. Henry*

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Appendix A

The *Innovative Clinical* court further explained the importance of giving independent meaning to the provisions of the long-arm statute when discussing subsections (2) and (3). First, it made clear that clear that subsection (3) of the long-arm statute contains independent limits on the exercise of jurisdiction. *Id.* at 355. Second, it reaffirmed *Gust v. Flint*, which rejected cases that had "held that subsection (2) was constrained only by, and thus was coextensive with, the Fourteenth Amendment of the U.S. Constitution." *Id.* at 354. It did so because reading subsection (2) to the limits of due process rendered subsection (3) superfluous, thereby eviscerating legislative intent. *Id.* at 354. Likewise, reading subsection (1) to be coextensive with due process would render subsection (3) superfluous. It would defy common sense to suggest

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> *County*, 277 Ga. 743(2), 594 S.E.2d 324 (2004); *Hollowell v. Jove*, 247 Ga. 678, 681, 279 S.E.2d 430 (1981). Accordingly, under these circumstances, the courts may not interpret OCGA § 9-10 91 to provide what the Legislature chose to omit.

Innovative Clinical, 620 S.E.2d at 355. Although in this particular passage the supreme court was directly addressing O.C.G.A. § 9-10-91(3), which provides for jurisdiction in specified circumstances over nonresidents committing tortious conduct outside of the state that causes injury within Georgia, the mandate of deference to the choices of the legislature, as expressed in plain statutory language, applies with equal force to the particular limitations contained in each and every subsection of the long-arm statute.

that the *Innovative Clinical* court intended to turn the "transacts any business within Georgia" prong into the new stepping stone around subsection (3).

Georgia courts have yet to fully explain the scope of the "[t]ransacts any business within this state" language. O.C.G.A. § 9-10-91(1). The unavoidable conclusion, as explained by the Georgia Supreme Court and also supported by traditional canons of statutory construction, is that this literal language, intentionally included by the Georgia General Assembly, must have some independent meaning. To equate any prong of the long-arm statute with the federal due process inquiry would render the language of the statute meaningless. *See Chatman v. Findley*, 274 Ga. 54, 548 S.E.2d 5, 7 (2001) ("Because the General Assembly is presumed to intend something by passage of the act, we must construe its provisions so as not to render it meaningless."). The statutory requirement that a nonresident defendant transact any business in Georgia must mean something more than, and cannot simply equate to, mere minimum contacts in a due process sense.

Were the two truly meant to be coextensive, the General Assembly simply would have adopted statutory language expressly incorporating constitutional due process as the sole limitation on jurisdiction, as several other states have done.[14] Moreover, equating the two

14. *See, e.g.*, Ala. R. Civ. P. 4.2(b) ("An appropriate basis exists for service of process . . . when the person or entity has such

(Cont'd)

inquiries would transform the ordinary search for the legislative meaning of the Georgia Assembly into a search for what the Supreme Court of the United States would allow under the evolving due process standard.

Ultimately, unless and until the Georgia courts provide further authoritative guidance, courts in this circuit construing the statute literally will have to delineate the precise contours of the "[t]ransacts any business within this state" requirement of O.C.G.A. § 9-10-91(1) according to the facts of each case.[15]

(Cont'd)

contacts with this state that the prosecution of the action . . . is not inconsistent with the constitution of this state or the Constitution of the United States."); Ariz. R. Civ. P. 4.2(a) ("A court of this state may exercise personal jurisdiction over parties, whether found within or outside the state, to the maximum extent permitted by the Constitution of this state and the Constitution of the United States."); La. Rev. Stat. Ann. § 13:3201(B) ("In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States."); Or. R. Civ. P. 4(L) (providing personal jurisdiction, "[n]otwithstanding a failure to satisfy the requirement of sections B through K of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States").

15. We do, however, caution the federal courts of this circuit to resist any temptation to define "[t]ransacts any business" solely or primarily in terms of the "foreseeability" of an impact

(Cont'd)

In sum, we adopt the guidance of the Georgia Supreme Court. We can no longer construe the Georgia long-arm statute as coextensive with constitutional due process. Instead, in assessing the propriety of the exercise of personal jurisdiction, courts must apply the specific limitations and requirements of O.C.G.A. § 9-10-91 literally and must engage in a statutory examination that is independent of, and distinct from, the constitutional analysis to ensure that both, separate prongs of the jurisdictional inquiry are satisfied.

(Cont'd)

on the Georgia forum, a concept frequently featured in the due process "minimum contacts" analysis. To do so would once again improperly conflate the long-arm and due process inquiries. Unlike the due process analysis, O.C.G.A. § 9-10-91(1), on its face, includes no element of "foreseeability." Although we do not go so far as to say that the "foreseeability" of an impact on the forum can never be a relevant consideration, there may be many instances in which such notions of "foreseeability" have absolutely no bearing on whether particular conduct can fairly and plausibly constitute the transaction of business in the state. Accordingly, engrafting a "foreseeability" component, which the Georgia General Assembly has not seen fit to include, onto the subsection (1) long-arm requirement would amount to just the sort of extension of the long-arm statute beyond its literal terms that the Georgia Supreme Court rejected in *Innovative Clinical*. *See Innovative Clinical*, 620 S.E.2d at 354, 355. Instead, regardless of their preferences or attempts to resort to analytical shortcuts, our courts must be limited to the bare language of the statute. Under subsection (1), analyzing whether the nonresident defendant "[t]ransacts any business within this state" is the sole touchstone of long-arm jurisdiction.

B.

We now turn to the district court's personal jurisdiction analysis in this case. We conclude that, although it is unclear whether the district court properly and independently applied the long-arm statute pursuant to the standard we set forth today, our own analysis persuades us to affirm the district court's conclusion.[16]

In its August 3, 2007, order denying the motion to dismiss for lack of personal jurisdiction, the district court properly cited O.C.G.A. § 9-10-91(1) as the controlling provision of the long-arm statute. The district court cited *Innovative Clinical* and the traditional three-part test for whether a nonresident transacted business within Georgia. *Diamond Crystal Brands, Inc. v. Food Movers Int'l Inc.*, No. CV407-42, 2007 U.S. Dist. LEXIS 56636, 2007 WL 2258715, at *2 (S.D. Ga. Aug. 3, 2007) (citing *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 631 S.E.2d 734, 737 (2006)). Nevertheless, it appears to us that the district court conducted an analysis chiefly focused on minimum contacts for due process purposes, without sufficient independent consideration of the statutorily required

16. *See Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1235 (11th Cir. 2004) ("This court may affirm a judgment on any legal ground, regardless of the grounds addressed and relied upon by the district court.").

element of transacting business in the state.[17] One result of the conjoined analysis was that the district court considered facts that were not relevant to the narrower question of whether Food Movers transacted any business in Georgia in a matter that gave rise to Diamond Crystal's cause of action.

Although we cannot say that the district court's approach was entirely unreasonable—after all, it relied on language from a decision of the Georgia Court of Appeals—we have already explained why we believe that this view of the personal jurisdiction test is fundamentally incompatible, as a matter of Georgia law,

17. For example, the court explained that the first two prongs of the three-part Aero Toy Store test go to "whether the defendant has sufficient minimum contacts with the forum." *Diamond Crystal*, 2007 U.S. Dist. LEXIS 56636, 2007 WL 2258715, at *2. This interpretation effectively read the independent long-arm inquiry mandated by *Innovative Clinical* out of the test and erroneously made the whole analysis about constitutional due process.

Additionally, the court's recitation of facts—replete with references to "contacts" and "purposeful activity directed at the forum state," 2007 U.S. Dist. LEXIS 56636, [WL] at *3—is virtually indistinguishable from a constitutional due process discussion. Thus, although the district court found that "Food Movers' conduct and knowledge shows that it purposefully conducted business within the forum state," 2007 U.S. Dist. LEXIS 56636, [WL] at *4, which at first blush sounds like a finding of "transacting any business" within Georgia, it is unclear whether the district court was sufficiently mindful of the independent requirements imposed by the Georgia long-arm statute.

with the controlling pronouncement of the standard by the Georgia Supreme Court in *Innovative Clinical*. *See supra* part III & n.11. Nevertheless, we conclude that a remand is unnecessary: the breadth of the Georgia long-arm statute and the facts that the district court did properly consider support a finding of jurisdiction under O.C.G.A. § 9-10 91(1).

IV.

As discussed in part III, *supra*, Georgia's long-arm statute permits jurisdiction where a plaintiff's cause of action "arises out of" a nonresident defendant's "transact[ion] of any business within [Georgia]." O.C.G.A. § 9-10 91(1). In light of *Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank of Ames, Iowa*, we must interpret this statute literally and give full effect to the breadth of its language. 279 Ga. 672, 620 S.E.2d 352, 353, 355 (2005).

Interpreted literally, "transacts any business" requires that the "'nonresident defendant has purposefully done some act or consummated some transaction in [Georgia] . . . .'" *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 631 S.E.2d 734, 737 (2006) (quoting *Robertson v. CRI, Inc.*, 267 Ga. App. 757, 601 S.E.2d 163, 166 (2004)). That said, a defendant need not physically enter the state. As a result, a nonresident's mail, telephone calls, and other "intangible" acts, though occurring while the defendant is physically outside of Georgia, must be considered. *Innovative Clinical*, 620 S.E.2d at 355–56. Therefore, we examine all of a

nonresident's tangible and intangible conduct and ask whether it can fairly be said that the nonresident has transacted any business within Georgia.[18] Here, because Food Movers sent purchase orders to a specific Georgia manufacturer, required delivery by customer pickup, arranged for third parties to pick up Splenda that it purchased in Georgia, and promised to pay money into Georgia, we conclude that it did.

In both transactions at issue, Food Movers sent purchase orders to Nasser, Diamond Crystal's California agent.[19] Each purchase order explicitly required (1) that it be "ship[ed] to: Diamond Crystal, 3000 Tremont Road

18. In conducting this mixed law and fact inquiry, we find instructive the literal definition of the words in the statute. "Transact" means "to prosecute negotiations," to "carry on business," "to carry out," or "to carry on." *Webster's Third New Int'l Dictionary* 2425 (1993). "Any" means "to any extent" or "in any degree." *Id.* at 97. "Business" means "activity directed toward some end," or "a usually commercial or mercantile activity customarily engaged in as a means of livelihood," or "transactions, dealings, or intercourse of any nature." *Id.* at 302. Hewing closely to the plain meaning of the statute serves the twin goals of giving effect to legislative intent and not engrafting requirements that do not appear on the face of the "plain and unambiguous statutory language," *Innovative Clinical*, 620 S.E.2d at 355.

19. Ultimately, we conclude that Food Movers transacted business in Georgia on the basis of the two transactions at issue in the breach of contract complaint; therefore, we do not rely on Food Movers's completed transactions for the purposes of the long-arm analysis.

. . . , Savannah, GA," (2) specified the price and quantity of Splenda, and (3) required delivery by "[c]ustomer picku[p]." One of the purchase orders even more explicitly required "p/u in Savannah, Ga. on 12/28/05." Thus, although Food Movers routed the purchase orders through Nasser and never physically brought the orders to Georgia, Food Movers sent the orders to a specific Georgia manufacturing facility and required delivery of the product in Georgia. After *Innovative Clinical*, Food Movers's routing of the purchase orders through a California intermediary—much like routing them through the postal service—does not prevent us from considering the purchase orders in the "transacts any business" equation.[20]

Significantly, Food Movers admits that Diamond Crystal tendered the two shipments at its Savannah plant and that the shipments were picked up. Food Movers claims that this is irrelevant because it was Food Movers's third-party customers who for their own account actually picked up the Splenda. We reject this argument.

First, we have held that "designat[ing] certain parties within the State of Georgia for receipt of the

20. We do not decide, however, that O.C.G.A. § 9-10-91(1) encompasses every transaction where a citizen from one state contracts with a Georgia manufacturer. We hold only that, in light of the Georgia Supreme Court's clarification that a party's intangible actions can amount to the transaction of business, Food Movers's sending purchase orders to a specific Georgia manufacturer and requiring delivery by customer pickup cannot be ignored in the long-arm inquiry.

goods purchased under the contract" helps support a finding that a nonresident transacted business in Georgia. *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 380 (5th Cir. 1980). In *Gold Kist*, Baskin-Robbins contracted with a Georgia cooperative for the sale of pecans. *Id.* at 376. It is unclear whether Baskin-Robbins ever personally accepted delivery of the pecans in Georgia. It did, however, designate a company located in Georgia to receive delivery, thus "part performance under the contract was to be effected in Georgia, by Baskin Robbins' own choosing." *Id.* at 380. Likewise, in the purchase orders at issue here, Food Movers specified delivery by customer pickup in Savannah. Although Food Movers never took physical possession of the Splenda, it did allow third parties to accept delivery of its Splenda in Georgia. Additionally, because manufacturers ordinarily do not release truckloads of product to random carriers, we can infer that Food Movers sent some communication to Diamond Crystal informing it of which carrier would pickup the Splenda in Savannah. *See, e.g.*, O.C.G.A. § 11-2-319(3) ("Unless otherwise agreed any case [when the term is F.O.B. the place of shipment] . . . the buyer must seasonably give any needed instructions for making delivery. . . ."). Thus, Food Movers also must have sent "evidence" to Georgia, either directly or by way of a third-party.

Second, under Georgia's enactment of the Uniform Commercial Code ("U.C.C."), Food Movers took title to the Splenda upon Diamond Crystal's tender, regardless of who actually hired the common carrier. "Unless otherwise explicitly agreed title passes to the buyer at

the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . ." O.C.G.A. § 11-2-401(2).[21] The parties observed an F.O.B. Savannah delivery[22] term by customer pickup; as a result, when Diamond Crystal tendered the goods at its Georgia plant and issued a bill of lading listing Food Movers as the consignee, Food Movers took legal title to the Splenda. *See Wells Dairy, Inc. v. Food Movers Int'l, Inc.*, 566 F. Supp. 2d 933, 943 (N.D. Ia. 2008). After *Innovative Clinical*, taking physical possession of the Splenda in Georgia is not necessary; Food Movers took legal title to goods located in Georgia, and that can be considered for the purposes of O.C.G.A. § 9-10-91(1). 620 S.E.2d at 355; *but see O.N.*

21. Food Movers never claimed that it merely assigned its right to the Splenda under the contract with Diamond Crystal. Rather, Food Movers has always maintained that it resold the Splenda. The bills of lading bear this out; each lists Food Movers as the "Consignee," which means the entity "to whom or to whose order the bill promises delivery." O.C.G.A. 11-7-102(1)(b). That Food Movers resold the Splenda rather than assigned its rights to it is significant because a present assignment of a contractual right immediately vests title in the assignee. *Gamble v. Mathias*, 61 F.2d 911, 911 (5th Cir. 1932) (concluding that an assignment of an insurance contract vested title to proceeds on the contract immediately even though the insurance company had not yet paid the claim); *Id.* ("[A] present assignment of an interest passes the title to it as of the date of the assignment.").

22. Whether the F.O.B. Savannah term, in light of any other pertinent factors, constitutes sufficient "transact[ion of] any business" in Georgia by Food Movers to support the exercise of personal jurisdiction under Georgia's long-arm statute does not depend on who proposed the term.

Appendix A

Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E.2d 437, 439 (1974) ("The goods were shipped [F.O.B. Georgia] . . . and, as we read this record, that is the only contact that appellees had with this state. . . . We hold that this is an insufficient 'contact' with the State of Georgia to comply with the requirement of [O.C.G.A. § 9-10-91(1)]. . . .").[23]

Finally, the course of dealing between the parties makes clear that Food Movers was to pay for the Splenda by transferring funds to Georgia. In each of the twelve transactions in which Food Movers did pay for the Splenda, it sent payments to Diamond Crystal in Georgia. The implied promise to send payments to Georgia is relevant to whether Food Movers transacted any business there.

In total, we find that Food Movers transacted business within Georgia. Food Movers sent purchase orders to Diamond Crystal in Georgia, Food Movers requested delivery by "customer pickup" at Diamond Crystal's plant in Savannah, Food Movers directed third parties to accept delivery of the goods in Savannah, Food Movers took legal title to the goods in Georgia, and Food Movers promised to pay money into Georgia on the two transactions in question. Thus, personal jurisdiction is appropriate under O.C.G.A. § 9-10-91(1).

23. *Innovative Clinical* likely overruled *O.N. Jonas* because *O.N. Jonas* did not give sufficient breadth to the "transacts any business" language of the long-arm statute. Regardless, that Food Movers took title to the goods is but one fact that supports the conclusion that it transacted business in Georgia.

Appendix A

V

Having found that Georgia's long-arm statute permits jurisdiction, we reach the jurisdictional analysis under the Due Process Clause of the Fourteenth Amendment. Food Movers casts itself as a passive buyer of goods whose sole contacts with Georgia involved indirectly sending purchase orders and directly sending payments. Appellant's Br. at 13-14. Food Movers contends that such a limited connection with the forum cannot satisfy the due process requirement of minimum contacts. We conclude that the Due Process Clause permits jurisdiction. Food Movers established sufficient minimum contacts when it purposefully carried on a substantial and ongoing relationship with a Georgia manufacturer, specified delivery by "customer pickup" in Savannah, took and transferred legal title to product in Savannah, and sent payments to Savannah on twelve of the fourteen transactions.

The Due Process Clause protects an individual's liberty interest in not being subject to binding judgments imposed by foreign sovereigns. *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985). The heart of this protection is fair warning—the Due Process Clause requires "'that the defendant's conduct and connection with the forum State [be] such that he should reasonably anticipate being haled into court there.'" *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100

S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980)). Therefore, states may exercise jurisdiction over only those who have established "'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984) (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)).

It is undisputed that if Food Movers is subject to jurisdiction at all, it is subject to specific jurisdiction. In specific jurisdiction cases, the "fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum . . . and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King*, 471 U.S. at 472-73, 105 S. Ct. at 2182 (internal quotations omitted). Put differently, the defendant must have "purposefully availed" itself of the privilege of conducting activities—that is, purposefully establishing contacts—in the forum state and there must be a sufficient nexus between those contacts and the litigation. Once this showing is made, a defendant must make a "compelling case" that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice. *Id.* at 477, 105 S. Ct. at 2185; *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 858-59 (11th Cir. 1990).

Appendix A

A.

We conclude that Diamond Crystal's cause of action grew out of Food Movers's purposeful contact with Georgia such that Food Movers reasonably should have anticipated defending suit there. At the outset, we underscore that the minimum contacts analysis is "'immune to solution by checklist.'" *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007) (quoting *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 499 (5th Cir. 1974). Thus, it is settled that entering a contract with a citizen of another state, standing alone, does not automatically satisfy the minimum contacts test. *Burger King*, 471 U.S. at 478, 105 S. Ct. at 2185.

Rather, when inspecting a contractual relationship for minimum contacts, we follow a "highly realistic approach" that focuses on the substance of the transaction: prior negotiations, contemplated future consequences, the terms of the contract, and the actual course of dealing. *Id.* at 479, 105 S. Ct. at 2185 (internal quotation omitted). The focus must always be on the *nonresident defendant's* conduct, that is, whether the defendant deliberately engaged in significant activities within a state or created continuing obligations with residents of the forum. *Id.* at 480, 105 S. Ct. at 2186-87. This focus ensures that a defendant will not be subject to jurisdiction based solely on "'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475, 105 S. Ct. at 2183 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. at 1473, 1478, 79 L. Ed. 2d 790 (1984)).

Appendix A

This case involves a forum seller's effort to sue a nonresident buyer in the seller's home forum for breach of contract. In this context, we have rejected jurisdiction when the buyer's *sole* contact with the forum is contracting with a resident seller who performs there. *See Borg-Warner Acceptance Corp. v. Lovell & Tharpe, Inc.*, 786 F.2d 1055, 1063 (11th Cir. 1986) (refusing to exercise jurisdiction where the primary contact involved an isolated purchase of goods manufactured in the forum under a contract negotiated outside of the forum). This follows from the two well-established propositions that neither merely contracting with a forum resident nor the forum resident's unilateral acts can establish sufficient minimum contacts.

But nonresident purchasers can still be subject to jurisdiction in the seller's forum. Jurisdiction is often found where further contacts or plus factors connect the defendant to the jurisdiction. *See, e.g., Sloss Indus.*, 488 F.3d at 931-33. Courts have considered a defendant's initiating the contractual relationship,[24] visiting the

24. *E.g., Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 933 (11th Cir. 2007); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 150-52 (5th Cir. 1980) (per curiam) (finding minimum contacts where, *inter alia*, defendant sent multiple purchase orders to plaintiff after initial solicitation); *Madison Consulting Group v. South Carolina*, 752 F.2d 1193, 1202-04 (7th Cir. 1985) (finding minimum contacts where, *inter alia*, the South Carolina defendant "actively reach[ed] out to solicit the services of a Wisconsin partnership" by flying a principal to the initial negotiations in Washington D.C., but cautioning that some solicitations will be too minor); *cf. Vetrotex Certainteed Corp. v.*

(Cont'd)

plaintiff's factory to assess or improve quality,[25] sending materials to the plaintiff for inspection or use in shipping,[26] participating in the manufacturing process,[27] establishing a relationship by placing multiple orders,[28]

(Cont'd)
Consol. Fiber Glass Prods. Co., 75 F.3d 147, 152 & n.5 (3d Cir. 1996) (refusing to find minimum contacts where the defendant was a "passive buyer," that is, one which has been "solicited as a customer of the plaintiff.").

25. *E.g., Sloss Indus.*, 488 F.3d at 931; *Bell Paper Box Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 820 (8th Cir. 1994) (finding minimum contacts where, *inter alia*, defendant's representative visited the plant to assure the initial run of custom products was satisfactory).

26. *Sloss Indus.*, 488 F.3d at 933.

27. *E.g., Southwest Offset*, 622 F.2d at 150-52 (finding minimum contacts where, *inter alia*, defendant publisher sent camera ready copies of its telephone directories and corrected proofs to the publisher in the forum); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084 (1st Cir. 1973) (finding minimum contacts where, *inter alia*, the nonresident buyer "actively supervised or actually participated in" the development of the product); *U.S. Kids*, 22 F.3d at 820 (finding minimum contacts where, *inter alia*, the defendant transmitted "camera-ready artwork necessary for the production of the portfolios and envelopes" to the forum).

28. *E.g., Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 551-52 (6th Cir. 2007) ("[T]he parties did not engage in a one-time transaction, but in a continuing business relationship that lasted many years. . . . Such contacts are not 'random,' 'fortuitous,' or 'attenuated,' but are the result of deliberate conduct that amounts to purposeful availment.").

requiring performance in the forum,[29] negotiating the contract via telefaxes or calls with the plaintiff;[30] the list goes on. Thus, in Sloss, we found sufficient minimum contacts with Alabama because the nonresident buyer placed ten unsolicited orders in just a few months with an Alabama company, sent a sample to Alabama, sent containers to Alabama for use in shipping, proposed an exclusive contractual relationship, and sent representatives to Alabama with the goal of improving the manufacturing process and furthering the relationship. 488 F.3d at 933.

A crucial, but often overlooked issue, is why these factors are important to the minimum contact analysis.

29. *E.g.*, *Biltmoor Moving & Storage Co. v. Shell Oil Co.*, 606 F.2d 202, 207 (7th Cir. 1979) (finding minimum contacts where, *inter alia*, "the moving contract absolutely required substantial and lengthy performance within Illinois" by all parties to the contract); see *N. Penn Gas v. Corning Natural Gas*, 897 F.2d 687, 690-91 (3d Cir. 1990) (per curiam) (finding minimum contacts with Pennsylvania where, *inter alia*, the contract required a Pennsylvania gas company to reserve storage space in its fields for a New York gas company, even though the New York company never actually stored gas there).

30. *E.g.*, *Sloss Indus.*, 488 F.3d at 933; *Air Prods. & Controls, Inc.*, 503 F.3d at 551-52 (finding minimum contacts in part based on several hundred telephone, email, facsimile, and ordinary mail correspondences for the purpose of discussing contracts and ordering goods); *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 382 (5th Cir. 2003) ("APA specifically and deliberately 'reached out' to a Texas corporation by telephone and mail with the deliberate aim of entering into a long-standing contractual relationship with a Texas corporation.").

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The "plus" factors and further contacts are not talismans. Rather, as the Supreme Court suggested in *Burger King*, the plus factors indicate that the defendant "deliberate[ly] affiliat[ed]" with the forum, 471 U.S. at 482, 105 S. Ct. at 2187 and thus should reasonably anticipate defending a suit there.

This case is close. In some ways, Food Movers had little to do with Georgia: Food Movers never communicated directly with Diamond Crystal in Georgia, Diamond Crystal's California agent initiated the overall relationship, and Food Movers never took an active role in the manufacturing process. Nevertheless, we conclude that Food Movers purposefully established minimum contacts with Georgia. As we explain, each individual transaction involved meaningful contact with Georgia and, by purposefully engaging in fourteen such transactions in just six months, Food Movers established a substantial and ongoing relationship with a Georgia manufacturer.

The terms of the contracts and the course of performance reveal that the transactions involved contact with Georgia. A contract calling for payment and delivery in a forum requires "contact" with the forum. *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1305 (11th Cir. 2000) ("Performance logically required contact and interaction with the United States, as discussed in the contract (such as designating a U.S. bank for payment and a point of departure for shipping).").

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Here, Food Movers submitted purchase orders to Diamond Crystal's California agent with instructions that the orders be "ship[ed] to: Diamond Crystal, 3000 Tremont Road . . . , Savannah, GA." Additionally, each purchase order specified that delivery would be by "[c]ustomer picku[p]" and, in most cases, further specified "please have ready to pick up in Savannah, GA" or "pick up in Savannah, GA." And in each transaction, Food Movers redelivered the product to its third-party customers by allowing its customers to take delivery in Savannah. Food Movers admits that it sent money to Georgia on twelve of the fourteen transactions—that is, every time it paid. Thus, each transaction involved payment, delivery, and Food Movers's redelivery of the product in Savannah.

Taking all of the transactions together, these purposeful contacts put Food Movers on notice that it could be haled into a Georgia court. *Burger King* requires a realistic examination of the entire course of dealing. In just six months, Food Movers purchased more than $ 1.9 million dollars worth of Splenda in fourteen transactions, each of which involved purposeful and meaningful contact by Food Movers with Georgia. Fourteen of these transactions in six months amounts to a substantial relationship in which Food Movers deliberately associated with Georgia. *See Burger King*, 471 U.S. at 473, 105 S. Ct. at 2182 ("[W]e have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state,' are subject to regulation and sanctions in the other State for the consequences of

their activities.") (quoting *Travelers Health Ass'n v. Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 647, 70 S. Ct. 927, 929, 94 L. Ed. 1154 (1950)). Thus, the "'quality and nature'" of Food Movers's interstate transaction with Diamond Crystal and Georgia is not so random or fortuitous that it "cannot fairly be said that [Food Movers] 'should reasonably anticipate being haled into court' [there]." *Burger King*, 471 U.S. at 486, 105 S. Ct. at 2189 (quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567).

Food Movers contends that our precedent forecloses this result. Specifically, it reads *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055 (11th Cir. 1986), and *Sloss Industries Co. v. Eurisol*, 488 F.3d 922 (11th Cir. 2007), for the rule that only nonresident buyers who are actively "involved in the production process in the forum" can have sufficient minimum contacts. Appellant's Br. at 26. Neither case requires such a broad rule, and, in any event, Food Movers's conduct went beyond that of a mere "passive purchaser."

Borg-Warner, for its part, involved an isolated purchase of goods produced in a forum. 786 F.2d at 1059. In this context, the court held that minimum contacts cannot be based merely on the manufacturing of the goods in the forum and a postdelivery forum visit to return defective merchandise. *Id.* at 1063. On its facts, *Borg-Warner* is thus distinguishable because it involved a lone transaction, whereas, here, Food Movers engaged in an ongoing course of dealing with Diamond Crystal.

Appendix A

Sloss involved a nonresident defendant who placed ten purchase orders for goods produced in and shipped from Alabama. 488 F3d at 931. The *Sloss* court properly distinguished the one-time transaction in *Borg-Warner* on this ground. *Id.* The court concluded, however, that the number of transactions, standing alone, could not give rise to minimum contacts because of our holding in *Banton Industries v. Dimatic Die & Tool Co.*, 801 F2d 1283 (11th Cir. 1986). *Id. Banton* held that a Nebraska firm lacked minimum contacts with Alabama when it filled an unsolicited order for goods shipped F.O.B. Omaha to an Alabama corporation, notwithstanding that the parties had engaged in similar transactions in previous years. 801 F.2d at 1284. The *Sloss* court distinguished *Banton* and found minimum contacts because, in addition to the number of transactions, the nonresident defendant placed unsolicited orders, had its agent send containers to Alabama for use in shipping, visited the forum for the purpose of improving quality, and proposed an exclusive relationship with the manufacturer in the forum. 488 F3d at 933.

Sloss does not decide this case in Food Movers's favor for two reasons. First, as in *Sloss*, we think that *Banton* is distinguishable. Second, like the defendant in *Sloss*, Food Movers's purposeful contact with the forum went beyond that of a completely passive purchaser.

First, *Banton* is distinguishable. Other than merely accepting the order from the Alabama plaintiff, the

transaction in *Banton* involved literally no contact with the proposed Alabama forum. *See* 801 F.2d at 1284 (characterizing the issue as "whether the due process clause prohibits the exercise of personal jurisdiction over a defendant whose sole contact with the forum state was an on out-of-state sale of goods to a resident of the forum state."). Therefore, *Banton* held only that when the defendant's *sole* contact with the forum is contracting with a forum resident, even a history of such transactions does not provide sufficient minimum contacts. Here, by contrast, in each individual transaction, Food Movers sent payment to Georgia and accepted delivery and redelivered the Splenda in Georgia.

Second, although Diamond Crystal initially approached Food Movers in California about the possibility of selling sweetener to it, Food Movers was far from a passive purchaser. Diamond Crystal's solicitation resulted only in an unenforceable general agreement about price and delivery terms. *Diamond Crystal Brands Inc. v. Food Movers Int'l, Inc.*, No. 407-42, 2008 U.S. Dist. LEXIS 55279, 2008 WL 2811940, at *5-6 (S.D. Ga. July 21, 2008) (finding that Food Movers presented "no evidence" that an overarching distributorship contract governed the relationship). Thus, no enforceable, overarching supply agreement governed the transactions, and Food Movers had no obligation to purchase Splenda from Diamond Crystal.

Rather, seemingly without further solicitation,[31] Food Movers voluntarily submitted fourteen purchase orders to Diamond Crystal's California agent. That a plaintiff first solicited a nonresident defendant does not nullify the significance of a defendant's initiation of subsequent of transactions. *See Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 150, 151-52 (5th Cir. 1980) (per curiam) (holding that when "Southwest, a Texas corporation, solicited Hudco's business through Southwest's sales representative in Alabama," and when, "[a]fter the initial order was placed with the sales

31. *See* Aff. of Anthony LaMonica, ¶¶ 15-16, Mar. 30, 2007 ("Nasser Company and Diamond Crystal Brands, Inc. sent their representatives to Food Movers' offices . . . . After that meeting at Food Movers' office, Nasser Company took several orders from Food Movers . . . ."); Aff. of Thomas Samuel LaMonica, P 17, Mar. 5, 2008 ("I subsequently negotiated with Mr. Seibel and we agreed upon contract for Splenda sales at a case price of $31.40 with a minium quantity of 11,000 cases per month."); *Id.* at ¶ 19 ("Once our credit application was accepted by Diamond Crystal Brands, Inc. . . . we submitted our first purchase order to the broker, Nasser . . . ."); *Id.* at ¶ 27 ("All of the purchase order submitted to Nasser were processed without further discussion . . . ."); *see also* Appellant's Reply Br. at 4 ("*Following* the telephone contacts by Nasser and Seibel in California and the meetings at Food Movers' offices in California, for several months between August 2005 and January 2006 Food Movers submitted purchase orders to Nasser in California for bulk quantities of Splenda.") (emphasis added). It does appear that after the initial five purchase orders, Diamond Crystal approached Food Movers to renegotiate the minimum quantities per month and price terms. Aff. of Thomas Samuel LaMonica, ¶ 23, Mar. 5, 2008.

representative, Hudco placed subsequent orders, approximately eight," Hudco "was no mere passive customer of a Texas corporation" in part because "Hudco repeatedly placed orders with the Texas corporation."). Therefore, Food Movers deliberately reached out to Diamond Crystal by voluntarily and purposefully initiating subsequent transactions.[32]

Moreover, the delivery terms and course of delivery underscore the connection between Food Movers and Georgia. The parties agreed that the Splenda would be delivered F.O.B. Savannah, Georgia, but cannot agree on who proposed the term. Accepting, *arguendo*, Food Movers's version of the facts, Diamond Crystal required the F.O.B. Savannah term because of the "volume of sweetener" involved. Under Georgia's enactment of the U.C.C., the term required Diamond Crystal to, at its plant, "ship the goods in the manner provided in this

32. Nor does Food Movers's routing of the purchase orders through Diamond Crystal's California agent negate Food Movers's reaching out to Georgia. In *Burger King*, the Supreme Court rejected the argument that because the Michigan defendant primarily interacted with the Florida plaintiff's Michigan office, the defendant had no reason to anticipate suit in Florida. 471 U.S. at 480, 105 S. Ct. at 2186. Such a holding would ignore substantial record evidence that the defendant "knew that he was affiliating himself with an enterprise based primarily in Florida." *Id.* Here, similarly, the record shows that Food Movers knew that it was contracting with a Georgia manufacturer: each Food Movers purchase order specified Diamond Crystal's Savannah, Georgia plant; Food Movers requested delivery by customer pickup in Savannah; and Food Movers paid money into Savannah.

article . . . and bear the expense and risk of putting them into the possession of the carrier." O.C.G.A. § 11-2-319(1)(a).

Significantly, Food Movers never argued that Diamond Crystal required delivery by customer pickup.[33] Food Movers's contention that Diamond Crystal required delivery "at the plant" is not to the contrary. Regardless of who paid for shipping, who bore the risk of loss, and when title shifted, the Splenda would be delivered at the plant. Food Movers thus could have paid to have the Splenda shipped outside of Georgia. Instead, Food Movers specified delivery by customer pickup for its own benefit and purposes.

Taking delivery by customer pickup distinguishes this case from ordinary F.O.B. forum cases. Although we have never explicitly reached this holding, we have cited cases that have rejected the argument that an F.O.B. forum delivery term provided sufficient minimum contacts. *E.g. Borg-Warner*, 786 F.2d at 1059-60 (citing *Scullin Steel Co. v. Nat'l Ry. Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982) and *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979)).

33. Food Movers does argue in its reply brief that Diamond Crystal "required delivery or customer pickup at its manufacturing plant in Georgia." Appellant's Reply Br. at 5. But Food Movers's affidavit evidence supports only that Diamond Crystal required delivery "at the plant." Aff. of Thomas Samuel LaMonica, ¶¶ 10-11, May 24, 2007 ("Because of the volume of sweeteners [involved] Mr. Seibel advised me that delivery would be required at the plant.").

Appendix A

An F.O.B. forum delivery term does not necessarily create minimum contacts because it is a formal term relating to title and who bears the risk of loss. Particularly when the goods are shipped outside of the forum, an F.O.B. delivery term may not be a sufficient indicator of the defendant's purposeful availment of the forum's laws. But here, Food Movers sought delivery by customer pickup; that is, the Splenda would not be shipped to Food Movers outside of Georgia at all. The "customer pickup" term indicated that Food Movers intended to affiliate with Georgia and invoke the benefits and protections of its laws.

Food Movers argues that we should ignore this contact because it never took physical delivery of the product in Georgia; its third-party customers did on and for their own account. It is well established, however, that physical contacts with a forum are not required. *Burger King*, 471 U.S. at 476. Although it never took physical delivery, Food Movers did take and transfer legal title to the Splenda in Georgia. *See supra* part IV. Casting formalism aside, Food Movers saved shipping costs and thus derived an economic benefit by middling the product off of Diamond Crystal's Savannah loading dock. Thus, Food Movers's simultaneous acceptance of delivery and redelivery at Diamond Crystal's Savannah plant underscores its connection with Georgia.

Alternatively, Food Movers contends that we should disregard its redeliveries because they did not "arise out of or relate to" the transactions at issue. This circuit has not adopted a rigid approach to determining when

contacts "arise out of or relate to" a cause of action. *See Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F3d 1210, 1222 & n.32 (11th Cir. 2009) (collecting the approaches of other circuits). In a recent torts case, however, we held that the contact must be a "but-for" cause of the alleged tort and that the purposeful contact must be such that the out-of-state resident will have "'fair warning that a particular activity will subject [it] to the jurisdiction of a foreign sovereign . . . .'" *Id.* at 1223 (alteration in original) (quoting *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182).

Even if Food Movers's customers had never picked up the Splenda, Diamond Crystal still would have had a claim for breach of contract. Strictly speaking, therefore, the customer pickup of the Splenda was not a "but-for" cause of Diamond Crystal's claim. Nevertheless, in a breach of contract action, the course of performance is clearly relevant to the "relationship among the defendant, the forum, and the litigation." *Helicopteros*, 466 U.S. at 414, 104 S. Ct. at 1872 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L. Ed. 2d 683 (1977)). As a result, we have considered a nonresident defendant's contacts with a forum during the course of delivery. *Sloss Indus.*, 488 F3d at 933 (considering it relevant that the nonresident defendant sent containers into the forum for use in shipping); *S & Davis Int'l*, 218 F3d at 1304 (considering the delivery term as a relevant contact); *see also Papachristou v. Turbines Inc.*, 902 F2d 685, 686-87 (8th Cir. 1990) (en banc) (considering the nonresident defendant's physical entrance into the forum during the course of delivery

in the minimum contacts analysis). Likewise, it is appropriate to consider Food Movers's legal, although not physical, acceptance of delivery in Georgia. And because Food Movers's redelivery of the Splenda coincided with its taking delivery, it can fairly be said that the redelivery also "related to" Diamond Crystal's breach of contract claim.

In sum, we conclude that Food Movers purposefully established sufficient minimum contacts with Georgia. Food Movers established a substantial and ongoing relationship with a Georgia manufacturer by engaging in fourteen transactions in six months, each of which involved contacts with Georgia. Food Movers spurred that relationship by sending unsolicited purchase orders to the Georgia manufacturer via the manufacturer's California agent. Each purchase order specified that delivery would be by customer pickup, and Food Movers did in fact allow its third party customers to take delivery of the Splenda in Georgia. Because Food Movers never paid for two of the shipments its customers picked up, it caused foreseeable injury to the plaintiff in the forum. *See Burger King*, 471 U.S. at 480, 105 S. Ct. at 2186. For these reasons, Food Movers purposefully established minimum contacts with Georgia and reasonably should have anticipated defending a suit there.

B.

In addition to minimum contacts, the exercise of jurisdiction must also comport with traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184. In this analysis, we look to "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several states in furthering fundamental substantive social policies.'" *Id.* at 477, 105 S. Ct. at 2184 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292, 100 S. Ct. at 564). We conclude that Food Movers has not presented the requisite "compelling case" that exercising jurisdiction would be unconstitutionally unfair. *Id.* at 477, 105 S. Ct. at 2185.

In fact, Food Movers does not even attempt to explain why litigating in Georgia would be especially onerous, much less how any such inconvenience achieves a "constitutional magnitude." *Id.* at 484, 105 S. Ct. at 2188. Instead, Food Movers argues only that in light of Diamond Crystal's connection with California, it would not be "unreasonable" to require suit there. Appellant's Br. at 29. But even if it would be reasonable to require suit in California, Georgia has a "manifest interest in providing effective means of redress for its residents." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957). Georgia's interest in exercising jurisdiction would often justify "serious

burdens" on a nonresident defendant. *S & Davis*, 218 F.3d at 1305 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114, 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92 (1987)). Plainly, it justifies jurisdiction here.

VI.

In sum, we conform this circuit's interpretation of Georgia's long-arm statute to state law as announced by the Georgia Supreme Court. We find that although the district court did not clearly apply the newly-elucidated standard, the exercise of jurisdiction comports with the independent dictates of both the Georgia long-arm statute and the Due Process Clause of the Fourteenth Amendment. Accordingly, the judgement of the district court is AFFIRMED.

SO ORDERED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION FILED AUGUST 3, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV407-42

DIAMOND CRYSTAL BRANDS, INC. and
DIAMOND CRYSTAL SALES, LLC,

Plaintiffs,

v.

FOOD MOVERS INTERNATIONAL, INC.,

Defendant.

ORDER

Before the Court is Defendant Food Movers International's Motion to Dismiss. (Doc. 5.) Defendant asserts that this case should be dismissed for lack of personal jurisdiction. After careful consideration, the Court finds that the Motion to Dismiss must be DENIED.

Appendix B

BACKGROUND[1]

This is a breach of contract action that arises out of the sale of artificial sweetener. Plaintiff Diamond Crystal Brands, Inc., ("Diamond") is a manufacturer of sugar and sweetening products with a manufacturing plant located in Savannah, Georgia. Defendant Food Movers International, Inc. ("Food Movers") is an international seller of sugar and sweetening products with its sole office located in California. Food Movers transacts with various manufacturers to purchase products in bulk. These transactions are also facilitated by outside food brokers. Nasser Company, Inc. ("Nasser") is a food broker that markets food products for Diamond. After the transaction for purchase is complete, Food Movers immediately resells the products to its customers. These customers accept delivery of the products from the manufacturer, and personally brand the products for resale to the public.

The events giving rise to this litigation began when Diamond and Nasser contracted with Food Movers in the fall of 2005. Diamond sent Scott Seibel ("Seibel"), its California based food manager, and a representative of Nasser to Food Movers' headquarters in California. As a result of the negotiations, Diamond sold Splenda to Food Movers in 14 transactions that took place from October 2005 to January 2006. The purchases included

1. On a motion to dismiss for lack of personal jurisdiction, the facts must be viewed in the light most favorable to the nonmoving party. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 255 (11th Cir. 1996).

approximately 11,000 cases of Splenda per month for more than $ 1,935,576.00.

The parties agreed that Diamond would tender the goods in Savannah, Georgia. However, the circumstances surrounding the delivery of the sweetener are hotly contested. Timothy L. Clemm ("Clemm") is the Vice President of Marketing for Diamond and was involved in the negotiations at Food Movers' headquarters. (Clemm Aff. ¶ 2, Tab B.) He maintains that Diamond initially offered the product delivery as F.O.B. Visalia, California.[2] (*Id.* ¶ 3, Tab B.) However, Clemm contends that Food Movers asked that the terms be changed to F.O.B. Savannah.[3] *Id.* Food Movers maintains that after purchase orders were sent to Nasser in California, it immediately resold the Splenda to third-party customers who were responsible for pick-up at the Savannah site. (T. LaMonica Aff. ¶ 13-14.) Therefore, Food Movers contends that it was not involved in pick up of the sweetener. Food Movers was invoiced from Diamond's plant in Savannah, Georgia. Purchase orders all

2. The term F.O.B. means "free on board." "[W]hen the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article." U.C.C. § 2-319(1) (b) (1978).

3. Thomas LaMonica ("T. LaMonica"), the Vice President of Sales for Food Movers, contends that Seibel informed him that delivery was necessary at the manufacturing site in Savannah, Georgia due to the volume of delivery. (T. LaMonica Aff. ¶ 10.) Furthermore, LaMonica contends that Clemm never had direct contact with Food Movers. (*Id.* ¶ 9.)

specified customer pick-up.[4] (*See, e.g.*, Purchase Order No. 14704, filed as Exhibit A to A. LaMonica Aff.) Pick-up was recorded as occurring via "buyer's truck."[5] (*See, e.g.*, Bill of Lading No. 775788, attached to Richtman Aff., Tab C.)

Food Movers sent payments by either mail or wire transfer to Diamond in Georgia. Diamond alleges that Food Movers failed to pay for purchases made on January 13 and 18, 2006, for a total of $ 288,111.60. Food Movers' alleged failure to pay for these two transactions gave rise to the present litigation.

Diamond filed a Complaint against Food Movers in the Superior Court of Chatham County on February 28, 2007 seeking damages in the amount of $288,111.60. Food Movers removed the case to this Court on March 22, 2007. On April 6, 2007, Food Movers filed the instant Motion to Dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

4. Food Movers argues that "customer" referred to its third party customers who were responsible for pick up of the delivery. (T. LaMonica Aff. ¶ 14-17.)

5. Food Movers contends that it did not hire or communicate with any of the carriers identified on the Bill of Lading. (T. LaMonica Aff. ¶ 16.) Instead, Food Movers' customers were responsible for hiring the carriers. (*Id.* ¶ 17.)

Appendix B

ANALYSIS

I. *Standard of Review*

On a motion to dismiss for lack of personal jurisdiction involving no evidentiary hearing, the Plaintiff bears the burden of establishing a prima facie case of jurisdiction over the non-resident defendant. *Robinson v. Giarmarco & Bill, P.C.*, 74 F3d 253, 255 (11th Cir. 1996). (*citing Madara v. Hall*, 916 F2d 1510, 1514 (11th Cir. 1990)). In order to establish a prima facie case, the plaintiff must present "enough evidence to withstand a motion for directed verdict." *Id.* at 255. The allegations set forth in the complaint must be regarded by the court as true, "to the extent they are uncontroverted by defendant's affidavits." *Id.* Furthermore, when the parties' evidence conflicts, "the district court must construe all reasonable inferences in favor of the plaintiff." *Id.*

II. *The Georgia Long Arm Statute and Due Process*

A court may only exercise personal jurisdiction over a nonresident defendant in accordance with the state long-arm statute and the Due Process Clause of the United States Constitution. *Nippon Credit Bank, Ltd. v. Matthews*, 291 F3d 738, 745 (11th Cir. 2002). Federal courts in Georgia are bound by the Georgia Long Arm Statute. *Id.* In breach of contract cases, personal jurisdiction may be exercised under the Georgia Long Arm Statute if the nonresident "[t]ransact any business within this state." O.C.G.A. § 9-10-91(1). The Supreme

Court of Georgia has held that because this section of the Georgia Long Arm Statute contains no explicit limiting conditions, such as the requirement of physical presence, a literal construction "grants Georgia courts the unlimited authority to exercise personal jurisdiction over a nonresident who transacts any business in this State." *Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank*, 279 Ga. 672, 675, 620 S.E.2d 352 (2005) (overruling all prior cases following a narrower interpretation of "transacts any business."). The statute confers jurisdiction "to the maximum extent permitted by procedural due process." *Id.*

Under Georgia law, therefore, "[j]urisdiction exists on the basis of transacting business in this state if (1) the nonresident defendant has purposefully done some act or consummated some transaction in this state, (2) if the cause of action arises from or is connected with such act or transaction, and (3) if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice." *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 518 S.E.2d 734 (2006). The initial two prongs of the jurisdictional test are used to determine whether the defendant has sufficient minimum contacts with the forum. *Id.* Specifically, a defendant will be fairly apprised of his duty to defend himself in a foreign state if the defendant has "purposefully directed" his activities at residents of the forum, and if the litigation results from alleged injuries that "arise out of or relate to" those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 104 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted).

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Modern day contracts are frequently accomplished through communications that obviate the need for physical presence within a state. *Burger King*, 471 U.S. at 476. Mail and telephone contacts are sufficient to confer jurisdiction. *Bank of Ames*, 279 Ga. at 676, 620 S.E.2d 352. Where the forum state is the point for payment and delivery, "the contract logically require[s] *contact* with the forum." *S & Davis Int'l Inc. v. Yemen*, 218 F3d 1292, 1304 (11th Cir. 2000) (emphasis in original). Courts often find that jurisdiction lies where the contract is formed or where it contemplates performance. *Burger King*, 471 U.S. at 479. "[P]arties who reach out beyond one state and create continuing legal obligations with citizens of another state are subject to regulations and sanctions in the other State for the consequences of their activities." *Id.* at 473.

If minimum contacts are established, courts may look to several factors to determine fairness, including "the burden on the defendant; the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)(citations omitted).

Appendix B

III. *Defendant's Motion to Dismiss*

Food Movers contends that it lacks sufficient minimum contacts to warrant personal jurisdiction in the state of Georgia. It argues that the only contact with the forum state has been in the form of mail or wire payments, which it maintains are not enough to establish minimum contacts. Furthermore, Food Movers claims that jurisdiction would create an unfair burden, because the company is a small, family owned business that has no other contacts with Georgia. In addition, Food Movers claims that suit would be more appropriate in California, because both parties have offices in that state.

Diamond contends that by making regular payments over a three month period, Food Movers reached out and made contact with the forum state. Furthermore, Diamond argues that Georgia retains personal jurisdiction over Food Movers in this case because the entire performance of the contract took place in Georgia. Diamond asserts that Georgia has an important interest in protecting its citizens from the type of contract breach at issue in this case. Diamond also contends that fairness is not harmed by fortuitous or random contact, because evidence shows that Food Movers was transacting business with Diamond for approximately three months.

Based on the facts, the Court finds that Food Movers established minimum contacts with Georgia. It is undisputed that Food Movers sent payments for the bulk sweetener to Diamond's plant in Georgia. These

payments represent a "purposeful activity directed at the forum state" that continued for approximately three months. During negotiations, Food Movers forecasted its contact with Georgia by estimating a purchase of more than 11,000 cases of Splenda over a three month period. Food Movers established minimum contacts by sending payments to Georgia in connection with 14 transactions between the parties. Furthermore, the cause of action arises out of these contacts because the alleged nonpayments were due to be paid in Georgia.

Food Movers also established minimum contacts in this case because the entire performance of the contract took place in Georgia. Diamond's contention that Food Movers requested to change the terms of delivery to F.O.B. Savannah shows that Food Movers intended, from the beginning of the parties' relationship, to purposefully direct its activities at the forum state. Although these negotiations took place at Food Movers' headquarters in California, contact with Georgia was accomplished when the product was delivered at Diamond's manufacturing plant in Savannah.

Food Movers bought sweetener that was located in Georgia and resold that sweetener to customers who completed the transaction by retrieving the product in Georgia. While Food Movers claims that it was not, itself, responsible for pick-up of the deliveries, it admits to selling the products to third-party customers who were responsible for receiving deliveries at the Savannah plant. Food Movers' argument that "customer pick-up" and "buyer's truck" both related to third-party

customers does not eliminate the contacts that it established when it chose this state as the point of delivery and later instructed third-party customers to arrange for pick-up in Georgia. Food Movers' conduct and knowledge shows that it purposefully conducted business within the forum state. With Georgia serving as the point of payment and delivery, the contract in this case "logically require[d] *contact* with the forum." *S & Davis Int'l Inc.*, 218 F3d at 1304. As such, Food Movers should have been aware that any failure to complete the terms of the contract could subject it to suit in Georgia.

The parties' actions in this case are similar to those taken in *Southwest Offset, Inc. v. Hudco Publ'g Co.*, 622 F.2d 149 (5th. Cir. 1980).[6] In that case, personal jurisdiction over the defendant was upheld based upon (1) soliciation by the plaintiff; (2) multiple orders from the defendant; (3) no visit to the forum state by the defendant; (4) manufacture of the product in the forum state; (5) payment to the forum state; and (6) delivery F.O.B. in the forum state. *Id.* at 149-152. The Court of Appeals for the Fifth Circuit found that the defendant, an Alabama corporation, had established minimum contacts with Texas when it entered into a contract with a Texas corporation for the publishing of telephone directories, and performance of the contract primarily

6. In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted at binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

took place in Texas. Personal jurisdiction was appropriate in the forum state because the defendant "could expect that Texas law might govern the enforcement of their contracts, since a substantial part of the expected performance would occur in Texas." *Id.* at 152. Personal jurisdiction is similarly appropriate in the case before the Court, because multiple orders were placed over a period of three months; the sweetener was manufactured in Georgia; payment was sent by Food Movers to Georgia; and delivery occurred F.O.B. Savannah, Georgia.

Finally, personal jurisdiction in this case would not be unfair. Although Food Movers argues that it is a small business with offices exclusively in California, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed upon the alien defendant." *S & Davis Int'l*, 218 F3d at 1305. The state of Georgia has an interest in protecting against, and adjudicating, contract breaches that occur within the state. Georgia is the appropriate forum, because the entire performance of the contract took place at Diamond's manufacturing plant in Savannah, Georgia. Food Movers engaged in a three month relationship with Diamond, and therefore, Georgia is not a foreign state. The relationship between the parties was substantial enough to warrant the exercise of personal jurisdiction over Food Movers in Georgia.

Appendix B

CONCLUSION

In light of the foregoing analysis, the Court finds that Food Movers is subject to personal jurisdiction in the state of Georgia. Accordingly, Defendant's Motion to Dismiss is **DENIED.**

SO ORDERED, this 3RD day of August, 2007.

s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 15, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-14782-FF

DIAMOND CRYSTAL BRANDS, INC., DIAMOND CRYSTAL SALES, LLC.,

Plaintiffs-Counter-Defendants-Appellees,

versus

FOOD MOVERS INTERNATIONAL, INC.,

Defendant-Counter-Claimant-Appellant,

HORMEL FOODS CORPORATION,

Counter-Defendant.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix C

Before: TJOFLAT, ANDERSON and STAPLETON,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED.**

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.